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Supreme Court of the United States

October Term, 1946

No. 190

ZACHARY BOZZA,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF

HAROLD SIMANDL,
Counsel for Petitioner.

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POINT I.

First Count.

At the trial, the government was content to try the case upon the theory that if petitioner was merely an underling serving at the beck and call of an employer and nothing more than that, he could not be held to be engaged in the business of a distiller (R. 102). However, in this Court and in the Court below, it has seen fit to question that theory of the case.

In *New York, &c R. Co.* v. *Estill,* 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, this Court held—that a theory of the case accepted by both parties at the trial, cannot be questioned for the first time on appeal.

The government has seen fit to argue as if a much broader question is before the Court. It seeks to establish that a non-proprietor may be convicted of a violation of the statute. Many decisions (involving other statutes), where the aider and abettor concept was applied under varying circumstances, have been cited. However, only a few decisions touching the problem actually before the Court, have been presented.[1]

The government's position has also forced it to contend that petitioner was a regular, not merely a casual employee; that he may have been a co-partner with Chirichillo in the illegal enterprise or he may have assisted Chirichillo on some other basis (Gov. Br. 14, 15);[2] or if he was a mere employee, his activity was not colorless[3] (Gov. Br. 16). The argument overlooks the fact that it was the government's burden to prove such matters, and that speculation cannot be allowed to do duty for probative facts.[4]

POINT II.

The government argues that the Trial Judge was vigorous in language but not partial (Gov. Br. 38). It points to the fact that in passing, he alluded to the rights of a defendant charged with crime, and instructed the jury to

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(1) *Occinto* v. *United States*, 54 F. (2) 351 (C. C. A. 8) (Gov. Br. 20) is not in point. Counsel for Occinto, in a request for instructions, admitted that the jury could find from the evidence that Occinto was an agent, lessee or permittee.
In *Cvitkovic* v. *United States*, 41 F. (2) 682 (C. C. A. 9) (Gov. Br. 21), the credible testimony indicated that the defendants were partners.

(2) See Government's argument regarding Counts 2 and 3 (Gov. Br. 27-34).

(3) This statement is apparently based upon a question that was so leading that the Assistant United States Attorney virtually was the witness. "Q. When you say help him around the place you mean in connection with the operation of the still? A. Yes" (R. 18).

(4) *Galloway* v. *United States*, 319 U. S. 379.

acquit if they thought the government had not proved the defendants' guilt beyond a reasonable doubt (Gov. Br. 37). However, the record is clear that he was not as emphatic when he delivered the latter as he was in delivering the portion immediately following, that dealt with their duty if they believed the government had proven guilt[5] (R. 107). It is entirely probable that the jury attached significance only to the part thus vigorously emphasized.

The government points to the fact that the summations of counsel are not contained in the record, and recklessly speculates that they *may* have contained statements that provoked the Trial Judge's behavior (Gov. Br., pp. 13, 36).

The learned Assistant United States Attorney who appeared at the trial and argued the appeal in the Circuit Court, did not so contend. He knew differently. The government had an equal right and opportunity to bring the summations before the Circuit Court if it felt they were material.[6] Moreover, the Assistant United States Attorney summed up after defense counsel had completed their summations (R. 93). The government provided him to argue in behalf of the "interests of the people." That was not a part of the Judge's duty.[7]

We do not think we are unduly critical of Mrs. Vettor's "identification." It consists of her bare oral assertion. Although the still was seized in January, and the trial took place in July, the officers were not able to produce anything which corroborated her or inculpated petitioner. Her

(5) Counsel in objecting, complained that the Trial Judge had *emphasized*—"and you don't return a verdict of guilty, then you have *failed most miserably* in the primary function which is yours as citizens of this country" (R. 109).

(6) Rule 26, Par. 5 (e) of the Rules of the Circuit Court of Appeals for the Third Circuit, permits an appellee to print an appendix containing such parts of the record as have not been printed in the appendix of appellant.

(7) *Weare v. United States*, (C. C. A. 8), 1 F. (2) 617, 619.

"identification" of petitioner during the trial was aided and assisted by the fact that before hand, she had been re-arrested and shown petitioner's photograph. The fact that it was then among 55 others did not diminish its effectiveness as an aid.[8] The officers probably knew of Mrs. Vettor's loose morals and heavy drinking. Yet, they did not attempt to test her assertion by arranging for an "identification parade" before she testified (R. 43).[9]

We believe that counsel's objection clearly and sufficiently challenged the attention of the Judge to the error he committed in delivering that portion of the charge commencing with his description of the government of this country (R. 106-109).

The exception is entirely sufficient to bring the matter to the attention of this Court.[10]

Respectfully submitted,

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(8) See *Wigmore on Evidence*, Third Edition, Vol. 3, Section 786 (4).

(9) See *Wigmore on Evidence*, Third Edition, Vol. 3, Section 736 (a).

(10) *Corliss v. United States*, 7 F. (2) 455 (C. C. A. 8).